86-965

Supreme Court, U.S.
FILED
DEC 8 1986
JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

MICHAEL MILLER and PATRICIA CATHLEEN MILLER, husband and wife; RALPH SMITH and JEANNE SMITH, husband and wife,

Petitioners,

vs.

MARK SULLIVAN, an individual, HARRY SULLIVAN and HELEN M. SULLIVAN, husband and wife,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS, DIVISION TWO, OF THE STATE OF ARIZONA

PETITION FOR WRIT OF CERTIORARI

MICHAEL LEWIS MILLER
Suite 1100
9000 Sunset Boulevard
Los Angeles, California 90069
(213) 271-2444
Attorney for Petitioners

Lawyers Brief Service / Legal Publishers / (213) 383-4457 / (714) 720-1510

10 3 1PP

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTIONS

I. Whether the exercise of personal jurisdiction by the State of Arizona over the officers and shareholders of a California corporation, and their wives, is repugnant to the Due Process Clause of the Fourteenth Amendment to the United States Constitution where:

(A) contracts were entered into between the corporation and respondents, residents of the state of Arizona, at the initiation and recommendation of respondents' accountant, subsequent to a meeting in California with petitioning corporate officers at which the accountant acted solely on behalf of, and at the initiation of, another Arizona client;

(B) there is no finding of fraud or other intentional tort by either the corporation or its officers but, rather, the mere unintentional failure by the corporation to register the contract as an investment

contract pursuant to an Arizona malum prohibitum statute;

(C) the wives took no part in, and were unaware of, either the meeting or the contracts; and

(D) the judgment ultimately rendered fails to establish the prima facie showing of jurisdictional facts, a fraudulent scheme, asserted by reference to the complaint in opposition to a prior motion to dismiss for lack of personal jurisdiction.

2. Whether the Arizona Supreme Court, vested with authority by the legislature to adopt rules of practice and procedure in judicial proceedings in the courts of that state, may adopt a long-arm rule which includes expanded jurisdictional bases in addition to providing for methods of service of process upon persons included within such bases.

LIST OF PARTIES

The parties to the proceedings below were Metro Productions, Inc., Producers' Liaison Corporation, petitioners Michael Miller, Patricia Cathleen Miller, Ralph Smith and Jeanne Smith, and respondents Mark Sullivan, Harry Sullivan and Helen M. Sullivan. The Honorable Robert K. Corbin, Attorney General of the State of Arizona, was an amicus curiae in the court below on the sole issue of treble damages. Although that issue is not addressed in this petition, and the Arizona Attorney General is not named as a party herein, he is being served with copies of this petition since the issue of the validity of the Arizona Rule of Civil Procedures, Rule 4(e)(2), under the United States Constitution is addressed in the petition.

The parties before this Court are the parties named in the caption of this petition. Michael Lewis Miller, attorney for petitioners, is petitioner Michael Miller.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	2
JURISDICTION	3
CONSTITUTIONAL PROVISION AND RULE INVOLVED	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	15
I. The Exercise Of Personal Jurisdiction By An Arizona Court Over The Shareholders And Officers Of A California Corporation And Their Wives Based Solely Upon A Single Corporate Meeting In California With An Arizona Accountant Acting For, And On The Initiative Of, A Third Party, Violates The Due Process Clause of the Fourteenth Amendment	15
A. The Courts Of Arizona Have Stretched The Reach Of Their Long-Arm Rule Beyond The Limits Of Due Process	15

B. Petitioners Did Not Avail Themselves Of The Privilege Of Conducting Activities Within Arizona So As To Invitee The Benefit And Protection Of The Laws Of Arizona..... 21

C. The Practice Of Denying A Jurisdictional Motion To Dismiss Merely Upon A Plaintiff's Reference To Pleadings Which reflect A Prima Facie Showing Of Personal Jurisdiction Deprives Defendants Of Due Process..... 21

II. The Arizona Supreme Court, Vested With Authority By The Arizona Legislature To Adopt Rules Of Practice And Procedure In Judicial Proceedings In The Courts Of That State, Exceeded It's Authority By Adopting A Rule Which Granted Long-Arm Jurisdiction To Itself 39

CONCLUSION..... 48

APPENDIX:

ORDER of Supreme Court of Arizona, dated and filed September 9, 1986.

OPINION of Court of Appeals of Arizona, Division Two, filed March 20, 1986.

ORDER and JUDGMENT of Superior Court of Arizona, filed September 14, 1986.

MINUTE ORDER of Superior Court of Arizona, dated December 19, 1983.

MINUTE ORDER of Superior Court of Arizona, dated November 17, 1983.

MINUTE ORDER of Superior Court of Arizona, dated September 2, 1983.

TABLE OF AUTHORITIES

Cases: **Page**

Arrowsmith v. United Press International,
320 F.2d 219 (1963)..... 44

Burger King Corp. v. Rudzewicz,
__ U.S. __,
105 S.Ct. 2174 (1985)..... 17, 25, 29

Calder v. Jones,
465 U.S. 783 (1984)..... 21 (FN1), 24

Hanson v. Denkla,
357 U.S. 235 (1958)..... 16, 22, 26

Heat Pump Equipment Co. v. Glen Alden Corporation,
93 Ariz. 361
380 P.2d 1016 (1963)..... 40

Ins. Corp. of Ireland v. Compagnie des Bauxites,
456 U.S. 694 (1982)..... 36

International Shoe Co. v. Washington,
326 U.S. 310 (1945)..... 21

Kulko v. Superior Court,
436 U.S. 84 (1978)..... 22

Marine Midland Bank, N.A. v.
Miller,
664 F.2d 899 (2d. Cir. 1981)..... 32

Meyers v. Hamilton Corp.
143 Ariz. 249
693 P.2dd 904 (1984)..... 17

Mississippi Publishing Corp. v.
Murphree,
326 U.S. 438 (1946)..... 41, 43

Pegler v. Sullivan,
6 Ariz. App. 338
432 P.2d 593 (1967)..... 41

Rush v. Savchuk,
444 U.S. 320 (1980)..... 21 (FN1), 24

Shaffer v. Heitner,
433 U.S. 1986 (1977)..... 29

Snyder v. Massachusetts,
291 U.S. 97 (1934)..... 30

The Steamer St. Lawrence,
1 Black. 522 (1861)..... 45

Washington-Southern Nav. Co. v.
Baltimore and Philadelphia
Steamboat Co.,
263 U.S. 629 (1924)..... 46

Worldwide Volkswagen Corp. v.
Woodson,
444 U.S. 286 (1980)..... 25, 29, 33, 37, 38

**Constitutional Provision
And Rules:**

United States Constitution,
Fourteenth Amendment, section 1..... 3

Due Process Clause of the
United States Constitution..... 3

28 U.S.C. § 1257(3)..... 3

Arizona Revised Statutes
§13-2301, et seq..... 5

Arizona Rules of Civil Procedure,
Rule 4(e)..... 4

Federal Rules of Civil Procedure
Rule 4(f)..... 43

Other Authorities:

Arizona State Bar Committee, Note,
1961 Amendment,
16 Ariz. Rev. Stat. (1973)..... 39

Jurisdiction and Civil Actions,
Casad (1983)..... 33

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1986

MICHAEL MILLER and PATRICIA CATHLEEN MILLER, husband and wife; RALPH SMITH and JEANNE SMITH, husband and wife,
Petitioners,

vs.

MARK SULLIVAN, an individual, HARRY SULLIVAN and HELEN M. SULLIVAN, husband and wife,
Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS, DIVISION TWO,
OF THE STATE OF ARIZONA

Petitioners Michael Miller, Patricia Cathleen Miller, Ralph Smith and Jeanne Smith, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals, Division Two, of the State of Arizona, entered in the above entitled proceeding on March 20, 1986.

OPINIONS BELOW

The opinion of the Court of Appeals, Division Two, of the State of Arizona, is an unpublished opinion filed March 20, 1986, affirming the denial of petitioners' motion to dismiss for lack of jurisdiction and the granting of summary judgment in favor of respondents. The order of the Supreme Court of Arizona, opinion of the Court of Appeals of Arizona, the judgment of the Superior Court and the rulings on the motion to dismiss, and the motion for summary judgment, are re-printed in the Appendix hereto, infra.

JURISDICTION

On September 9, 1986, the Arizona Supreme Court denied petitioners' petition for review of the decision of the Arizona Court of Appeals, Division Two, which held that the State of Arizona may exercise personal jurisdiction over petitioners in this case. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISION AND RULE INVOLVED

This case involves the Due Process Clause of the Fourteenth Amendment to the United States Constitution and the Arizona "long-arm" rule.

Section 1 of the Fourteenth Amendment to the United States Constitution, in pertinent part, provides:

> "No state shall * * * deprive any person of life, liberty or property, without due process of law * * *".

The Arizona Rules of Civil Procedure, Rule 4(e)(2), in pertinent part, provides:

> "When the defendant* * *is a person,* * * corporation or unincorporated association subject to suit in a common name which has caused an event to occur in this state out of which the claim which is the subject of the complaint arose, service may be made as herein provided, and when so made shall be of the same effect as personal service within the state."

STATEMENT OF THE CASE

In November, 1978, respondent, Mark Sullivan, an Arizona resident, entered into a production service agreement with Metro Productions, Inc. ("Metro"), a California corporation, under which Metro produced for him a videotaped television program. Shortly thereafter, respondents Harry and Helen Sullivan[1] signed

[1]The record reflects that two contracts were entered into between Metro and Helen Sullivan but none were entered into with Harry Sullivan; Helen Sullivan used a Nevada address on her contracts.

similar agreements[1] with Metro. (Respondents are members of the same family and Arizona residents.)

On January 20, 1983, respondents filed a complaint against Metro, petitioners and others seeking rescission and treble damages under, inter alia, the Arizona Racketeering Act (Arizona Revised Statutes §13-2301, et seq.). They claimed that each of the defendants acting alone and in concert, as their predicate acts, violated the Arizona Securities Act by selling unregistered securities, selling securities by unregistered dealers and salesmen, developed an elaborate scheme and artifice to

---

[1]The agreements were executed by Metro in California after having been signed by respondents. The agreements contain a California choice of law provision and provide for a security interest under the California Uniform Commercial Code and for perfection in California. The agreements contemplated a production of the programs by Metro in California and the deposit of the completed masters in a California vault.

defraud in connection with the sale of securities and willful violations of the Arizona Consumer Fraud Act. According to the complaint, the respondents had become the victims of "an intricate network composed of individuals, corporations, proprietorships and enterprises which have successfully defrauded investors across the United States, including the [respondents], by selling tax sheltered investments in pilot television series."

Metro was in the business of producing television programs. Pursuant to a production service agreement, Metro hired out its services to purchasers who retained Metro to produce individual episodes of Metro's television series. The production services of Metro were sold to purchasers through Metro's wholly-owned subsidiary, Producers Liaison Corporation, a Delaware corporation ("Producers"). Producers entered into an agreement with Rennert

Investment Company ("Rennert"), a Utah entity, under which Rennert was authorized to sell Metro's production services to purchasers. Rennert was an independent contractor of Producers. One of Rennert's employees was Duane McCleary.

James Allen ("Allen") had been, for a number of years, respondents' accountant at the time of the events of this action. One of Allen's clients, not one of the respondents, brought the availability of Metro's services to his attention. The client was considering retaining Metro to produce a program, and requested Allen's advice. Allen's client put him in contact with Rennert's salesman, Duane McCleary. A meeting, set up by the client, took place in Metro's office (located in California) at which Allen and McCleary met with petitioners Michael Miller and Ralph Smith ("Corporate Officers"), Metro's shareholders and officers, to discuss Metro's services. Neither the Corporate Officers nor Metro agreed to compensate Allen for

additional clients of Allen who became purchasers of Metro's services; according to Allen, McCleary did.

Allen returned from California to Arizona and, after conducting an independent investigation of Metro's program, recommended to his client, and on his own initiative, to respondents, that they enter into agreements with Metro. Respondents executed the production service agreements in Arizona and transmitted them with their down payment to Allen in Arizona who in turn transmitted it to either Metro or McCleary (it was, in either case, ultimately received by Metro). Metro then executed the agreements and returned them to respondents in Arizona.

Allen was deposed on May 20, 1983 at which he testified as to his activities. This deposition was held within ten days of service of the summons and complaint on petitioner Michael Miller and

prior to his being represented in the action.[1]

On June 6, 1983, Metro, its affiliated corporations and petitioners moved to dismiss the complaint for lack of personal jurisdiction. The moving parties asserted that respondents had the burden of establishing jurisdiction by coming forward with facts, established by affidavit or otherwise, and could not simply rest on the allegations in their rather ambitious complaint. Petitioners also urged that while the contacts of Metro with Arizona did not meet the "minimum contacts" required by the Due Process Clause of the Fourteenth Amendment to the United States Constitution, there was a total absence of any contacts of the petitioners with the State of

---

[1]The affidavits of service reflect that one copy of the summons and complaint was mailed to "Mr. and Mrs. Michael Miller" and one copy.

Arizona.[1]

The Corporate Officers had been named in the complaint because they were alleged masterminds of an "elaborate scheme" to defraud. Respondents, in opposition to the motion to dismiss, revealed that the Corporate Officers were sued because they were, by definition in the Arizona Racketeering Act, persons "in control" of, and therefore liable with, Metro and its subsidiaries.

The equation offered by the respondents was that the complaint and deposition provided a prima facie showing of an event in Arizona, the Metro contracts, and that the contracts were minimum contacts insofar as they were a purposeful activity.

---

[1] In fact, the complaint itself is entirely in accord with petitioners' view. At paragraph 11 of the complaint, it is alleged with respect to Metro that it "has caused an event to occur within the State of Arizona out of which this claim arose." There is no similar allegation with respect to any of the petitioners.

The wives of the Corporate Officers, petitioners Patricia Cathleen Miller and Jeanne Smith ("Wives"), were named[1] in the complaint solely in their capacities as spouses. Respondents did not even mention the Wives in opposition to the motion. Apparently they were content to rest upon their complaint which alleged marriages in community property states.[2] After all the dust had settled, respondents requested the court to find a prima facie showing of personal jurisdiction

---

[1] As "Jane Doe Miller" and "Jane Doe Smith". The complaint was never amended to state their true names.

[2] On mandate from the Arizona Court of Appeals to the Superior Court, in objecting to the form of judgment, petitioners submitted proof that the Millers had not yet married at the time of the Allen meeting or the Metro contracts. They also submitted evidence that the Smiths were not domiciled in a community property state at such times.

from allegations in the complaint and the Allen deposition. On September 9, 1983, the trial court denied, without opinion, the motion to dismiss.

On August 2, 1983 (prior to decision of the motion to dismiss), respondents moved for summary judgment solely on their Racketeering Act claim that the Metro production service agreement was an investment contract which should have been registered and sold by registered securities dealers in Arizona. This claim involved a malum prohibitum statute which did not involve either an intent to commit the alleged violation or fraud. On November 17, 1983, respondents' motion for summary judgment was granted.[1]

[1]The petitioners, after engaging new Arizona counsel, were able to obtain a partial correction nunc pro tunc of the minute order of November 17, 1983. The minute order of December 19, 1983 corrected the prior order which had stated that Allen was employed by Producers' Liaison Corporation to solicit Arizona investors. As corrected, the order states that Allen was compensated by Metro or Producers' Liaison Corporation to solicit Arizona investors. There was no evidence of any such arrangement.

On September 14, 1984, judgment was entered against, inter alia, petitioners. At respondents' request, the other claims in the complaint, which already served their purpose, were quietly dismissed. The Wives were each referred to in the judgment only as "et ux.". Quite interestingly, the judgment does not recite the denial of petitioners' motion to dismiss nor does it contain a recitation that the court had jurisdiction.

Petitioners thereafter timely appealed, inter alia, the denial of their motion to dismiss to the Arizona Court of Appeals, Division Two. They urged the Court of Appeals to reverse the order denying their motion to dismiss upon the ground of lack of personal jurisdiction over them under the Due Process Clause of the Fourteenth Amendment.

In essence, petitioners argued that respondents had failed to meet their burden of establishing by facts, not allegations, that each party had at least some minimum contact with

Arizona; that in the absence of any such contacts the complaint should have been dismissed. They also urged that neither marriage nor statutory joint liability per se is a substitute for either causing an event in, or contact with, the state of Arizona.

On March 20, 1986, the Court of Appeals affirmed the judgment of the Superior Court on the basis of the California meeting of the Corporate Officers with Allen, the subsequent execution of the agreements with Metro by respondents in Arizona, and the payment by respondents of their down payment in Arizona to Allen and its ultimate transmission to Metro. There was no mention of the Wives in the Court of Appeals opinion other than to note that they were among the moving parties.

On April 9, 1986, petitioners petitioned the Arizona Supreme Court for review of the Court of Appeals order. Petitioners urged that the Court of Appeals had improperly affirmed the trial court's

denial of their motion to dismiss for lack of personal jurisdiction as a result of respondents' failure to establish that petitioners had either caused an event to occur in Arizona or that they had the requisite minimum contacts with Arizona. On September 9, 1986, the Arizona Supreme Court denied the petition for review.

REASONS FOR GRANTING THE WRIT

A. The Exercise Of Personal Jurisdiction By An Arizona Court Over The Shareholders And Officers Of A California Corporation And Their Wives Based Solely Upon A Single Corporate Meeting In California With An Arizona Accountant Acting For, And On The Initiative Of, A Third Party, Violates The Due Process Clause Of The Fourteenth Amendment.

1. The Courts Of Arizona Have Stretched The Reach Of Their Long-Arm Rule Beyond The Limits Of Due Process.

While the concept of "minimum contacts" must, almost by definition, remain somewhat uncertain and therefore determined on a case-by-case basis, there is a point reached at which it ceases to have meaning. The bulwark of "minimum contacts" is the principle, enunciated in Hanson v. Denkla, 357 U.S. 235 (1958), that there be "some act by which the defendant purposefully avails itself of conducting activities within the forum state. . . ". (357 U.S. at 253)

> "This 'purposeful availment' requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts. Keeton v. Hustler Magazine, Inc., supra, 465 U.S. at __, 104 S.Ct., at __; Worldwide Volkswagen Corp. v. Woodson, 444 U.S. at 299, 100 S.Ct., at 568, or of the 'unilateral activity of another party or a third person,' Helicopteros Nacionales de Colombia, S.A. v. Hall, supra, 466 U.S., at __, 104 S.Ct., at 1873. Jurisdiction is proper, however, where the contacts proximately

> result from actions by the defendant himself that create a 'substantial connection' with the forum State. McGee v. International Life Insurance Co., supra, 355 U.S. at, 223, 78 S.Ct., at 201; see also Kulko v. California Superior Court, supra, at 1698." [emphasis in original.] Burger King Corp. v. Rudzewicz, ___ U.S. ___, 105 S.Ct. 2174 at 2183 (1985).

Until the decision in the case sub judice, the outer limits of Arizona long-arm jurisdiction were reached in Meyers v. Hamilton Corp., 143 Ariz. 249, 693 P.2d 904 (1984). In that case, which involved the same section of the Arizona long-arm rule ("caused an event") and the same issue of "minimum contacts", Arizona residents booked passage on a cruise ship operated by a sister state corporation as part of its non-forum business. There was no direct contact between the parties prior to the cruise; the plaintiffs booked the cruise through an Arizona travel agency and paid for the tickets in Arizona. The travel agency forwarded the payment to defendant and received the tickets from defendant which it transmitted to plaintiffs.

The cruise ship left Miami, Florida with plaintiffs on board; however, their luggage was not placed on the ship and plaintiffs did not derive pleasure from their cruise. Defendant had advertised its cruise business in Arizona but its bookings were handled by local travel agents.

The Arizona Supreme Court, after holding that the action was for breach of contract in which there was a total failure of consideration, found minimum contacts to exist in the exchange of money for tickets in Arizona combined with defendants advertisement in Arizona. Chief Justice Holohan dissented on the grounds that the alleged breach, although it "touched" Arizona, was not an event that occurred in Arizona, and that the exchange of money for tickets coupled with the advertisement was so unrelated to the claim that it could not be used to support Arizona jurisdiction. He stated:

"The matter at issue involves activities which happened totally outside of Arizona. At most one can describe the loss of luggage as collateral to the contract, but it is not sufficient to support jurisdiction in a constitutionally cognizable sense. World Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980). Under the rationale of the majority if one of the defendant's waiters spilled soup on the plaintiffs while at sea, Arizona would have jurisdiction of plaintiffs' complaint in contract against the defendant for failure to deliver a pleasure cruise." 143 Ariz. at 254

The petitioners respectfully urge that the situation contemplated by Chief Justice Holohan has occurred in the present case; however, not only has the contracting party been forced to defend in Arizona for an out of state act, but its officers and their wives have as well.

In Meyers the contract could possibly be utilized as the "contact", since the defendant was a party thereto; and the tort (committed, if at all, by a contracting party) at least "touched" upon both the contract and the "contact". Here the contract

was not a "contact" as to the petitioners; it was an obligation between respondents and Metro. However, the decision of the Court of Appeals, sub judice, would, if applied to the facts of Meyers, permit Arizona to subject the officers of the cruise ship company, and their wives, to personal jurisdiction based solely upon the corporation's contract with Arizona residents. Certainly it would now include the waiter and his wife: he's the active tortfeasor; his master-servant relationship with a party who contracted with Arizona residents would be attributed to him to provide a "minimum contact" to Arizona. Naturally, his wife's marital status would render her amenable to Arizona personal jurisdiction.

This would violate Due Process and represent a sharp turn away from traditional notions of fair play and substantial justice.

B. Petitioners Did Not Avail Themselves Of The Privilege Of Conducting Activities Within Arizona So As To Invite The Benefit And Protection Of The Laws Of Arizona.

Before a person[1] can become amenable to personal jurisdiction, he must "have certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

---

[1]Although "[e]ach defendant's contacts with the forum state must be asserted individually", Calder v. Jones, 465 U.S. 783, 790 (1984); Rush v. Savchuk, 444 U.S. 320, 332 (1980), the petitioners fall into two categories which, except as noted, permit separate analysis without causing them harm. The petitioners will, therefore, continue to be referred to as the "Corporate Officers" and the "Wives".

> "[I]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws." Hanson v. Denkla, 357 U.S. 235, 253 (1958); Kulko v. Superior Court, 436 U.S. 84, 96 (1978).

To permit amenability to personal jurisdiction in the forum state without the requirement that each defendant engage in an act of purposeful availment, subjects such a foreign state defendant to an abridged right of personal liberty which the Due Process Clause was specifically designed to protect. The quintessential truth underlying the various tests by which "minimum contacts" is determined, is the fairness of subjecting a defendant to enforced responsibility to answer in the forum for his actions in either the place of the occurrence or their foreseeable result. It is a fundamental tenet of our jurisprudence that persons are to be held accountable for their actions. But to permit the actions of one person to

be ascribed as the purposeful availment of another, is to open the door to the very abuse visited upon petitioners herein.

Viewed from the Wives' perspective, their husbands went to the office one day, had a meeting of which they (the Wives) were totally unaware, yet they awoke on a later day to be summoned to Arizona or to lose their property. From the Corporate Officers' perspective, they attended a meeting at their company's office (located in California) with an Arizona accountant whose client had requested the meeting and who subsequently introduced other of his clients to the corporation's services. The Corporate Officers, too, subsequently find themselves subject to Arizona personal jurisdiction. The respondents' argument for Arizona personal jurisdiction is based upon an attribution to each petitioner of the actions of others, and in the case of the Wives a compounding of attribution upon attribution.

While, for good reason, we do not today have the clear cut "presence within the territory" concept of Pennoyer, and have embarked into the complex territory of "minimum contacts", there must still be an act of purposeful availment by the defendant either within the forum state or having consequences in the forum state in order to subject him to its personal jurisdiction.

The California meeting was held at Metro's office to discuss Metro's business with an accountant representing a potential customer (not one of the respondents) of Metro. While it may be questioned whether this meeting alone represented a purposeful availment by Metro to conduct activities "within" Arizona, it is beyond argument that the Corporate Officers did not intend to purposefully avail themselves of any such privilege. And it is with respect to their acts that their amenability must be judged. Calder v. Jones, 465 U.S. 783 (1984); Rush v. Savchuk, 444 U.S. 320

(1980).

> ". . . this 'fair warning' requirement is satisfied if the defendant has 'purposefully directed' his activities at residents of the forum, Keeton v. Hustler Magazine, Inc., 465 U.S. ___, ___, 104 S.Ct. 1473, 1478, 79 L.Ed.2d 790 (1984), and the litigation results from alleged injuries that 'arise out of or relate to' those activities, Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. ___, ___, 104 S.Ct. 1868, 1872, 80 L.Ed.2d 404 (1984). [Emphasis added]. Burger King Corp. v. Rudzewicz, ___ U.S. ___, 105 S.Ct 2174, at 2182 (1985).

Had there been an ulterior purpose for the meeting, suchas the perpetration of a fraud for personal gain or a personal intent to cause harm, all as alleged in the complaint, then it could be argued that the Corporate Officers acted for themselves; but without such extraordinary circumstances, it was a meeting solely for the advancement of corporate purposes. The fact that they would, perhaps, achieve indirect financial gain from the transaction is too attenuated to be held a

"contact". Worldwide Volkswagen Corp. v. Woodson, 444 U.S., at 299 (1980).

The Wives committed no acts at all which could be the basis of jurisdictional amenability. Certainly a lack of any acts will of necessity preclude further analysis as to the requisite character such acts must assume to be valid jurisdictional bases. The assertion of personal jurisdiction over the Wives, based upon their husbands' meeting with Allen, would be a patent violation of the traditional notions of fair play and substantial justice which establishes the outer limits of Due Process.

The circumstances preceding and following the meeting, too, lead inexorably to the exception to purposeful availment discussed in Hanson v. Denckla:

> "The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State." 357 U.S. at 253.

The meeting was set up with Metro by a client of Allen who wanted additional information about the Metro program (which he became aware of on his own initiative). The client sent Allen, as his accountant, to California to meet with representatives of Metro. The salesman, McCleary, who worked for an independent distributor of Metro's product pursuant to an agreement with Metro's sales subsidiary, Producer's Liaison Corporation, agreed to pay for his time spent in analysing the program for his client. Apparently, McCleary also agreed to make a similar payment to Allen for each of his clients who purchased Metro's program. The respondents were such clients; Allen introduced them to Metro's program without Metro, the Corporate Officers or the Wives having any contact with them. Again, there would have to be an attribution of McCleary's actions in order to attribute Allen's actions to the Corporate Officers and then a further attribution of the acts of the

Corporate Officers to the Wives in order to obtain permissible personal jurisdiction in Arizona.

The acts which have been used to base personal jurisdiction over the petitioners are the unilateral activities of others, not their own. Even with respect to Metro, the purposeful availment is rather thin. It was Allen's independent, unilateral activities which brought forth the agreements with respondents.[1] There was no arrangement between Metro or the petitioners and Allen at all.

As to the petitioners, any activity which is examined as a basis of personal jurisdiction is clearly the unilateral activity of another.

The logic of disallowing the unilateral activities of others to be attributed to the finding that these petitioners purposefully availed

---

[1]The record reflects that there are no agreements with Harry Sullivan at all, only the agreements with Helen Sullivan on which she used a Nevada address and one with Mark Sullivan.

themselves of conducting activities within the forum, operates to instill life in the other limits of personal jurisdiction. This is particularly clear when analysing the problem from the perspective of "the relationship among the defendant, the forum, and the litigation". Shaffer v. Heitner, 433 U.S. 186, 204 (1977). It cannot be fairly said that the petitioners had "fair warning", (Shaffer v. Heitner), that the meeting in California might subject them personally to being "haled into" Arizona, (Burger King; Worldwide Volkswagen), or that they engaged in any conduct or connection with Arizona such that they could "foresee" being haled into Arizona, (Worldwide Volkswagen). And, without requiring a defendant's own conduct to form his own amenability, the protection discussed in Worldwide Volkswagen that potential defendants can "structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to

suit". 444 U.S. at 297, has no meaning whatsoever.

This case affords a look at the unjust result which can flow from a disregard of this Court's mandates in the International Shoe doctrine. For not only has the principle enunciated in that case been violated, but almost every single holding in its progeny has been disregarded to reach a finding of personal jurisdiction over the petitioners in Arizona.

Respondents' thusfar successful attempt to cut the cloth of this case to fit the pattern of "minimum contacts" is not a novel strategy. In another context, Justice Cardozo commented:

> "A fertile source of perversion in constitutional theory is the tyranny of labels. Out of the vague precepts of the Fourteenth Amendment a court frames a rule which is general in form, though it has been wrought under the pressure of particular situations. Forthwith another situation is placed under the rule because it is fitted to the words, though related faintly, if at all, to the reasons that brought the rule into existence."

Snyder v. Massachusetts, 291 U.S. 97, at 114 (1934).

C. The Practice Of Denying A Jurisdictional Motion To Dismiss Merely Upon A Plaintiff's Reference To Pleadings Which Reflect A Prima Facie Showing Of Personal Jurisdiction Deprives Defendants Of Due Process.

Petitioners, inter alia, moved to dismiss the complaint for lack of personal jurisdiction on June 6, 1983. The moving parties argued that respondents had the burden of establishing jurisdiction by coming forward with facts, established by affidavit or otherwise, which could be the bases of amenability of petitioners to personal jurisdiction in Arizona. Instead of offering proof, respondents opted to make a prima facie showing of jurisdiction by simply referring to the allegations of their complaint and the Allen deposition.

Arizona practice on a motion to dismiss is

similar to the practice of United States District Courts in deciding a Rule 12(b)(2) motion:

> "It may determine the motion on the basis of affidavits alone; or it may permit discovery in aid of the motion; or it may conduct an evidentiary hearing on the merits of the motion. Visual Sciences, Inc. v. Integrated Communications Inc., 660 F.2d 56 (2d Cir. 1981); Welsh v. Gibbs, 631 F.2d 436, 438-39 (6th Cir. 1980), cert. denied, 450 U.S. 981, 101 S.Ct. 1517, 67 L.Ed.2d 816 (1981); Data Disc, Inc. v. Systems Technology Associates, 557 F.2d 1280, 1285 (9th Cir. 1977). If the court chooses not to conduct a full-blown evidentiary hearing on the motion, the plaintiff need make only a prima facie showing of jurisdiction through its own affidavits and supporting materials." Marine Midland Bank, N.A. v. Miller, 664 F.2d 899, 904 (2d Cir. 1981).

Despite the reminder in Marine Midland Bank, N.A., 664 F.2d, at 904 that "[e]ventually, of course, the plaintiff must establish jurisdiction by a preponderance of the evidence, either at a pretrial evidentiary hearing or at trial", 664 F.2d, at 904, it is apparently general practice that a defendant's

assertion of Due Process by a preliminary motion to dismiss is long forgotten during the litigation process. Further, since the dual purposes of the minimum contacts doctrine are to protect "the defendant against the burdens of litigating in a distant or inconvenient forum . . . [a]nd . . . to ensure that the States, through their courts, do not reach out beyond the limits imposed on them . . . in a federal system" (444 U.S., at 292), such a practice defeats the very purposes of the Due Process Clause.

As stated in Jurisdiction and Civil Actions, Casad (1983):

> "This approach [requiring only a prima facie showing of jurisdiction to avoid dismissal] is somewhat anomalous. If the plaintiff fails to prove at trial the basis for jurisdiction, the action theoretically should be dismissed for want of jurisdiction, even though the merits of the claim have been litigated. Even if the action is then dismissed, the defendant will have lost much of the very right the jurisdictional basis requirements are

> designed to protect: the right not to have to litigate that case in that forum. Although many cases can be cited in which the court has purported to reserve final decision on the personal jurisdiction question until after trial on the merits [citing cases], cases in which the court has actually dismissed a case for lack of jurisdiction after trial are very rare indeed. [citing cases]" At §6.01 [3] [b], page 6-8.

The author of the text was able to point to only one such case.

The complaint, to which respondents referred the Superior Court of Arizona for a prima facie showing of jurisdiction, though inartfully pleaded, presented the exposition of an alleged "elaborate scheme" to defraud which involved an "intricate network" of parties. Precisely who did what was not stated with precision. Paradoxically, the only precise statement was that Metro alone had caused an event to occur in the State of Arizona. Nevertheless, the court denied the motion as to all moving parties, including the petitioners. Apparently, the court was impressed that the

Corporate Officers had in fact participated in the alleged scheme; how the court determined jurisdiction to exist as to the Wives can only be assumed to result from the pleading of their marital status. Yet, even prior to the trial court's determination of the motion to dismiss, the respondents had filed with the same judge their motion for partial summary judgment which asserted that, without a question of fact, there was per se liability under Arizona's securities registration statute. In effect, the motion for summary judgment belied the claim of an elaborate scheme. Petitioners' motion to dismiss was thereafter denied and respondents' motion for partial summary judgment was granted. The judgment became an adjudication of facts which were contrary to the allegations upon which personal jurisdiction over the petitioners was based.

The unfurling of magnified claims in a complaint, irrespective of their grounding in truth, effects a corresponding truncation of a defendant's Due Process rights. This practice of trading ink on paper for personal liberty invites a hard look. Upon scrutiny, it cannot wash. As this Court duly noted, in Ins. Corp. of Ireland v. Compagnie des Bauxites, 456 U.S. 694 (1982), at 701:

> "In McDonald v. Mabee, 243 U.S. 90, 37 S.Ct. 343, 61 L.Ed. 608 (1917), another case involving an alleged lack of personal jurisdiction, Justice Holmes wrote for the Court, 'great caution should be used not to let fiction deny the fair play that can be secured only by a pretty close adhesion to fact.' Id., at 91, 37 S.Ct. at 343-344."

While in Ins. Corp. of Ireland, this Court accepted the premise that a defendant's Due Process rights are waivable, and that, therefore, facts may be deemed established, upon which to base jurisdiction, it did not go so far as to hold that the mere allegations in a complaint can be balanced

against the proper assertion of Due Process rights by a defendant. This is particularly true where the defendant has not waived his rights nor acted improperly in the proceeding.

It is an unfortunate fact that our courts are overburdened. The policy problem raised by this case is whether or not a defendant in a civil action, asserting his personal liberty under the Due Process Clause, is entitled to put plaintiff to his proof at the commencement of the action. To permit the respondents' complaint to serve as the yardstick for the court's determination of petitioners' amenability to the court's personal jurisdiction, is to create an invidious circuity which abridges Due Process.

> "The Due Process Clause of the Fourteenth Amendment limits the power of a state court to render a valid personal judgment against a non-resident defendant. Kulko v. California Superior Court, 436 U.S. 84, 91 (1978)." Worldwide Volkswagen Corp. v. Woodson, 444 U.S., at 291.

In effect, a jurisdictional motion to dismiss urges that the court is limited until it has been established that it may proceed. A plaintiff urges by reference to his complaint that, despite defendant's protestations, the court is not so limited. The acceptance of a prima facie showing of jurisdiction based upon the pleadings is tantamount to permitting the court to hold that it has jurisdiction because the plaintiff says that that it has. The circuit is complete and such a defendant must proceed to the merits or default at his peril. Certainly the simple symbosis of an expansive pleading and the prima facie acceptance thereof cannot be sufficient to re-balance the "principles of interstate federalism embodied in the Constitution." 444 U.S., at 293.

II. The Arizona Supreme Court, Vested With Authority By The Arizona Legislature To Adopt Rules Of Practice And Procedure In Judicial Proceedings In The Courts Of That State, Exceeded It's Authority By Adopting A Rule Which Granted Long-Arm Jurisdiction To Itself.

Arizona bases its long-arm jurisdiction over petitioners upon its long-arm rule, Rule 4(e)(2) of the Arizona Rules of Civil Procedure. This rule was adopted effective October 31, 1961 by an amendment to the then existing Arizona Rules of Civil Procedure which did not contain a long-arm provision. It is intended to give Arizona residents the maximum privileges which the Constitution of the United States permits them to have. (Arizona State Bar Committee, Note, 1961 Amendment, 16 Arizona Rev. Stat. (1973)). Unlike most states, Arizona has utilized a court-promulgated rule rather than a long-arm statute.

The rule itself deals with two distinct, but related, matters. Firstly, it defines the bases of

long-arm jurisdiction ("doing business in this state" and "caused an event to occur in this state out of which the claim which is the subject of the complaint arose") and it provides for the manner of service by which personal jurisdiction over the defendant is perfected. While the manner of service provisions of the Rule are not offensive, a court-promulgated rule, by which jurisdiction is expanded to include foreign defendants, presents an encroachment to a defendant's Due Process rights under the Fourteenth Amendment to the United States Constitution.

In an early challenge to its rulemaking power with respect to this Rule, the Supreme Court of Arizona, in Heat Pump Equipment Co. v. Glen Alden Corporation, 93 Ariz. 361, 380 P.2d 1016 (1963), held that the rule was a proper exercise of its judicial rulemaking power to regulate practice and procedure, since, in their view, it dealt merely with process. The Arizona Supreme Court compared its

rulemaking powers to those of this Court with respect to the Federal Rules Of Civil Procedure, citing Mississippi Publishing Corp. v. Murphree, 326 U.S. 438 (1946). The Supreme Court of Arizona, and the lower courts of Arizona, have consistently held that the court acted within its power to adopt the Rule. (See Pegler v. Sullivan, 6 Ariz. App 338, 432 P.2d 593 (1967)) The comparison between this Court's power and that of a state supreme court, as well as the interpretation of Mississippi Publishing Corp. v. Murphree, supra, was incorrect.

While the federal courts enjoy such of the federal judicial power as has been granted to them by Congress under the original grant to the federal government by the states, each of the states enjoys a residual sovereignty. State sovereignty is limited only by grants to the federal government and other restrictions on state action enumerated in, or necessarily included within, the United States

Constitution. The line of demarcation between federal and state judicial power was set in the Constitution. There is no reciprocal gear by which each advance of Congress, operating within the grant, represents a retreat by the Several States. The power resides with the federal government and it is a federal choice as to whether or not to exercise the power.

The situaton is quite different with respect to the relationship among the Several States, particularly in the context of long-arm jurisdiction. Here, each advance by one state from the strict territorial adherence which characterized the pre-International Shoe era, represents a retreat by the other States. There is a clear reciprocity and mutual accomodation among the States themselves which is not present in federal-state judicial dichotomy. The benchmarks for fairness and justice in these interstate relations are established in conformity to the Due Process Clause of the

Fourteenth Amendment to the United States Constitution.

In Mississippi Publishing Corp. v. Murphree, supra, this Court examined its power to adopt Rule 4(f) of the Federal Rules of Civil Procedure and its efficacy in a diversity case. A fundamental assumption was made that the district court had subject matter jurisdiction and that Rule 4(f) served "only to impliment the jurisdiction over the subject matter which Congress has conferred, by providing a procedure by which the defendant may be brought into court at the place where Congress has declared that the suit may be maintained." 326 U.S. at 445. Thus, the combined grant of federal jurisdiction and perfection by service of process, pursuant to Rule 4(f), were permissible.

However, in the context of a state court, long-arm jurisdiction was not known to the common law. The Arizona Constitutional grant of

judicial power to the courts of Arizona did not include long-arm jurisdiction. Therefore, it was incumbent upon the legislature of the State of Arizona to confer long-arm jurisdiction upon the courts of that State. Thereafter, the Supreme Court of Arizona could permissibly exercise its rulemaking function with respect to manner of service.

This requirement of legislative grant of long-arm jurisdiction protects the forum state as well. Each state's determination of the extent of its long-arm reach represents a balance between providing its residents with a convenient forum versus the tendency of expanded long-arm statutes to discourage contacts with the forum. A respect for this balance is the raison d'etre for the rule adopted in the federal system of referring to forum state long-arm statutes in federal actions. (Arrowsmith v. United Press International, 320 F.2d 219, at 226 (1963)).

In essence, the problem presented is whether or not expanded jurisdictional bases are merely an exercise of forum state procedure or whether they are not in reality, viewed from the perspective of a foreign defendant, an encroachment upon protected personal liberty. The balance should be struck in favor of the defendant.

This Court has condemned attempts by courts to expand their own jurisdiction. The oft foggy environment of admiralty jurisdiction has been enlightening on the topic. In The Steamer St. Lawrence, 1 Black. 522 (1861), the Court determined that, under then existing Admiralty Rules, the recognition of a state lien was not an encroachment on exclusive federal admiralty jurisdiction. Chief Justice Taney, after stating that ". . . there is a wide difference between the power of the court upon a question of jurisdiction and its authority over the mode of proceeding and process" (at page 526), held that an alteration by the Supreme Court

of the Admiralty Rules was valid since it dealt with process and had "no relation to the question of jurisdiction." In Washington-Southern Nav. Co. v. Baltimore and Philadelphia Steamboat Co., 263 U.S. 629 (1924), the Court was presented with the issue of whether or not the failure of a libelant to provide security for a cross-libelant's claim pursuant to a Supreme Court change in the Admiralty Rules imposed impossible or onerous conditions upon litigants in admiralty. Justice Brandeis stated for the court that "the function of rules is to regulate the practice of the court and to facilitate the transaction of its business." (at page 635). After stating that this function includes the regulaton of the "forms, operation and effect of process", he warned that "no rule of court can enlarge or restrict jurisdiction." (at page 635).

The petitioners were required to appear in Arizona and defend this action on the merits. The court determined that they were amenable to

personal jurisdiction pursuant to bases established by a court-promulgated rule. It is respectfully submitted that the rule was invalid as an encroachment upon their rights under the Due Process Clause of the Fourteenth Amendment to the United States Constitution. The encroachment was exacerbated by the Arizona court's determination that the bases of jurisdiction were, in fact, present because, and only because, the complaint so stated. The courts of the State of Arizona have, therefore, granted to themselves jurisdiction and have determined that as a matter of practice they will accept a plaintiff's allegation that the bases have been met. What to the courts of Arizona appears to be practice and procedure is, to the petitioners, a matter of personal liberty. The reach of the rule is too distant and affects too substantial a right to be condoned as mere procedure.

CONCLUSION

For these various reasons, this Petition For Certiorari should be granted.

Respectfully submitted,

MICHAEL LEWIS MILLER
9000 Sunset Boulevard
Suite 1100
Los Angeles, California 90069
(213) 271-2444

Counsel of Record for Petitioners

December 8, 1986

September 9, 1986

FILED

SEP -9 1986

DAVID R. COLE

CLERK SUPREME COURT,

By

The following action was taken by the Arizona Supreme Court on September 9, 1986.

IT IS ORDERED that the Petitions for Review in the below listed cases are denied:

CV 86 0264-PR MARK SULLIVAN et al et ux vs. METRO PRODUCTIONS, INC. et al
2 CA-CIV 5568

THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

FILED
MAR 20 1986
CLERK COURT OF APPEALS
DIVISION TWO

MARK SULLIVAN, an individual, and HARRY and HELEN M. SULLIVAN, husband and wife,	2 CA-CIV 5568 DEPARTMENT A
	O P I N I O N
Plaintiffs/Appellants/ Cross-Appellees,	
vs.	
METRO PRODUCTIONS, INC., a California corporation; PRODUCERS' LIAISON CORPORATION, an alleged Delaware corporation; MICHAEL and PATRICIA KATHLEEN MILLER, husband and wife; RALPH and JEAN SMITH, husband and wife	
Defendants/Appellees/ Cross-Appellants.	

APPEAL FROM THE SUPERIOR COURT
OF MARICOPA COUNTY

Cause No. C-478719

Honorable William T. Morroney, Judge

AFFIRMED AS MODIFIED

TEILBORG, SANDERS & PARKS, P.C.
By J. Clayton Berger — Phoenix

Attorneys for
Plaintiffs/Appellants/Cross-Appellees

FENNEMORE, CRAIG, vonAMMON, UDALL & POWERS
By Timothy Berg, William L. Thorpe
and Douglas A. Blaze — Phoenix

Attorneys for
Defendants/Appellees/Cross-Appellants

Robert K. Corbin, the Attorney General
By Patrick M. Murphy, Frank L. Murray
and Eileen W. Hollowell — Phoenix

Amicus Curiae on Arizona
Racketeering Act Treble Damage Issue Only

F E R N A N D E Z, Judge

Appellants Harry, Helen and Mark Sullivan appeal from the trial court's ruling that they are entitled to actual damages only, contending that the Arizona Racketeering Act, and specifically A.R.S. §13-2314(A), requires that they be awarded treble damages. Appellees Metro Productions, Inc., Producers' Liaison Corporation, Michael and Patricia Miller and Ralph and Jean Smith (hereafter "Metro"), have cross-appealed, contending that the trial court erred in denying their motion to dismiss for lack of jurisdiction and in granting partial summary judgment in favor of the Sullivans because disputed issues of material fact exist.

In November 1978, Mark Sullivan entered into a production service agreement with Metro Productions under which Metro produced a 30-minute master videotape of one episode of a 65-program series called "The Sam Diego Show." Shortly thereafter, Harry and Helen Sulllivan signed a production service agreement for the

purchase of two videotape episodes of "The Sam Diego Show." Each tape was sold at a cost of $100,000. For each tape, the Sullivans paid $8,000 down and signed a promissory note for the balance of $92,000. The notes called for interest-only payments of $2,400 per year for five years and for certain payments on the principal to be made from income generated by distribution of the tapes to various television stations and TV cable networks throughout the world. The promissory notes were due in five years, but with the payment of $1,000 in the fifth year, the promissor could extend the note and convert it to a non-recourse note so that any additional payments could be obtained only from revenues earned from distribution of the tape.

The agreement provided that the master videotape was to be stored at the purchaser's expense in a vault to be obtained by Metro Productions. The purchaser signed a financing

statement which created a security interest in the tape. The vault storage master agreement provided that the purchaser could not remove the tape from storage without Metro Production's written consent until the promissory note was paid in full.

The production service agreement also provided that the purchaser would contact a management consulting firm within 14 days of signing the agreement to "help Owner [purchaser] in the selection of a distributor for the purpose of exhibiting the Tapes in all media." It further provided: "Owner also warrants that he will engage a management consulting firm within thirty (30) days of contract date." Metro Production's brochure stated as follows:

> "After determining which tapes you desire to have produced for you, and after you have executed a Production Service Agreement, it will then be necessary for you to take the initiative to engage a Management Services Group, which will act as your agent to obtain a Distributor to

market your television video tapes. There is a Management Service Group specializing in handling the placement and exploitation of video tape masters, which is accessible by telephone."

The Sullivans signed a management and service agreement with Investors Management Services, Inc., a Connecticut corporation, as did all the other purchasers of Metro's tapes. Neither Metro Productions nor its officers and shareholders hold an interest in Investors Management Services.

The Management agreement was for a period of five years. There was no provision for any earlier termination date. The agreement refers to the production service agreement between the Sullivans and Metro Productions and directs all payments to be made to Metro Productions. It also states: "Owner acknowledges that Manager did not solicit Owner's business but that the Owner sought the services of the Manager." To date no revenues have been received from the Sullivans' tapes nor

have any episodes of "The Sam Diego Show" been televised. Metro Productions apparently sold in the same manner nearly 1,000 episodes of various programs on subjects such as sewing, cooking, diet and health, coping with life and game shows.

The Sullivans learned of the investment from their accountant, James Allen, who in turn had learned of it from another client. Allen spoke to the salesman, Duane McCleary, about the investment, and McCleary agreed to pay Allen's expenses for the two of them to travel to Los Angeles to discuss it with Miller and Smith, the sole shareholders and officers of Metro Productions and Producers' Liaison. McCleary is apparently an employee of Rennert Investment Company of Utah, a company which entered into an agreement with Producers' Liaison to solicit purchasers for Metro's tapes. McCleary agreed to pay Allen $400 for each person Allen introduced to McCleary who entered into a production service agreement. Six of Allen's

clients, including the Sullivans, entered into agreements with Metro Productions.

The Sullivans purchased the investment as a tax shelter. Included in the brochure on the investment were projected tax savings over the life of the promissory note and various comments about depreciation and investment credits to be taken by the purchasers. After the Internal Revenue Service disallowed their deductions, the Sullivans sued.

The complaint was filed in January 1983, and sought rescission of the agreements and return of the Sullivans' money because of violations of Arizona securities laws in the sale of unregistered securities by unregistered salesmen, damages for fraud and violations of the Consumer Fraud Act, and treble damages under the Arizona Racketeering Act (RICO). A partial summary judgment was entered in September 1984 in favor of the Sullivans on the racketeering act violations,

with the court finding that the agreements are securities that are not exempt from registration. It is undisputed that neither Metro Productions nor Producers' Liaison is a licensed broker/dealer and that neither McCleary nor Allen is a licensed securities salesman. The Sullivans were awarded actual damages of $48,485, pre-judgment interest, costs and $25,000 attorney's fees. The remaining causes of action were then dismissed, and this appeal and cross-appeal followed. We address the cross-appeal issues first.

SUMMARY JUDGMENT MOTION

Metro contends the trial court erred in granting summary judgment to the Sullivans on their RICO count, insisting that fact issues exist. The trial court found that the investment was not registered and that no salesman was licensed to sell securities, the court determined there had been a RICO violation. The only question on appeal then is whether the trial court was correct in its

determination that the investment is a security or an investment contract.

The United States Supreme Court has established a three-prong test for determining whether the purchase of an interest is the purchase of an investment contract, S.E.C. v. W.J. Howey Co., 328 U.S. 293 (1946), and that test applies in Arizona. Rose v. Dobras, 128 Ariz. 209, 624 P.2d 887 (App. 1981). "The test is whether the scheme involves an investment of money in a common enterprise with profits to come solely from the efforts of others." 328 U.S. at 301.

Metro contends there are factual issues as to the existence of a common enterprise. "A common enterprise is one in which the fortunes of the investor are interwoven with and dependent upon the efforts and success of those seeking the investment or of third parties." S.E.C. v. Glenn W. Turner Entperprises, Inc., 474 F.2d 476, 482 n.7 (9th Cir.), cert denied, 414 U.S. 821 (1973).

Metro contends that, since Metro Productions' only obligation under the production service agreement was to produce a one-half hour videotape program, there can be no common enterprise between it and the Sullivans. Appellees argue that, once the tape was delivered, Metro Productions' obligations ended. Although that statement is correct, it does not end the matter. The trial court observed in its minute entry ruling on the motion that "[b]ecause of the nature of the financing through which the programs were sold by Metro to the investors, profits would also flow to Metro, once the show was marketed." As we noted earlier in our statement of the facts of this case, the promissory note provided that payments on the principal would be paid to Metro from revenues earned by distribution of the tape. After the fifth year of the note, if the promissor paid $1,000, the note became a non-recourse instrument, so that the only way Metro would then receive full

payment of the principal would be if distribution of the tape produced revenues. Hence, the fortunes of the Sullivans were interwoven with Metro's.

This case is not like that of De Luz Ranchos Investment, Ltd. v. Coldwell Banker & Co., 608 F.2d 1297 (9th Cir. 1979). There the purchaser assumed control over the parcels of land, and the seller retained no interest other than a deed of trust to secure payment. The court noted that the seller's contractual obligation ended with the transfer of title. In this case, the Sullivans did not have full control over the tape, since it was placed in storage and could not be removed until the promissory note was paid in full. In addition, any revenues received from distribution of the tapes were required to be paid directly to Metro Productions. The Sullivans thus lacked full control over any revenues received from the tapes. The trial court correctly found that appellees raised no genuine

issue of material fact with regard to the existence of a common enterprise.

Metro also contends that a factual issue exists as to the third prong of the Howey test, that the buyer must have entered into the agreement with the expectation that any profits would come solely from the efforts of the seller or others. Appellees insist that the Sullivans did not make a passive investment, since the promotion brochure informed purchasers that they would have to distribute the tapes themselves or engage an agent to distribute them. The brochure makes several references to a purchaser's need to show he is not relying on a third party to make income for him.

The Ninth Circuit, in Turner Enterprises, supra, noted that the word "solely" in the Howey test is not to be read as a literal limitation on the definition. That court held "we adopt a more realistic test, whether the efforts made by those other than the investor are the undeniably

significant ones, those essential managerial efforts which affect the failure or success of the enterprise." 474 F.2d at 482. The emphasis in determining whether an investment is a security is on economic reality. Tcherepnin v. Knight, 389 U.S. 332 (1967). Realistically, the only effort the purchasers made was to select an agent to handle distribution of the tapes. No other act was required nor expected of them. Although the brochure speaks in terms of the purchasers distributing the tapes themselves as though that were truly an option, the production service agreement requires the purchasers to hire an agent to handle distribution within 30 days of signing the agreement. Any revenues the purchasers realize from their investments would thus be the result of essential managerial efforts of others. The trial court found that the "investments were offered without regard to the experience or sophistication of the investors in the television industry. It was

not intended or expected by Metro or its salesmen that the typical investor would attempt to market his tapes himself." Again, the trial court was correct in finding that no fact question existed on the third prong of the Howey test, and we affirm the summary judgment entered in favor of the Sullivans.

PERSONAL JURISDICTION

Metro Productions moved to dismiss the complaint for lack of personal jurisdiction. Metro Productions initially filed an answer which did not contain an affirmative defense of lack of jurisdiction. It later filed a motion to dismiss and moved to amend its answer to include the defense. The motion to amend was granted after no opposition was filed. The motion to dismiss was denied after the court heard oral argument on the issue.

We find that the evidence presented to the

trial court supports its determination. The Sullivans' accountant, James Allen, testified at his deposition that he met in Los Angeles for a couple of hours with Miller and Smith, the sole shareholders and officers of both Metro Productions and Producers' Liaison, and discussed the investment in great detail. The Sullivans executed their contracts in Arizona and transmitted it to either Metro Productions or to a salesman who represented Metro. Since Miller and Smith clearly acted with the intent to induce Allen to obtain purchasers of the tapes in Arizona, and since that inducement resulted in six agreements with Arizona residents, we find no error in the court's ruling. See Helicopteros Nacionales de Columbia v. Hall, __ U.S. __, 104 S.Ct. 1868 (1984); Meyers v. Hamilton Corp., 143 Ariz. 249, 693 P.2d 904 (1984).

RIGHT TO TREBLE DAMAGES

The Sullivans sought treble damages in the trial court, claiming that they are mandated by A.R.S. §13-1214(A). The trial court declined to award treble damages, citing no reason for its decision. Metro contends that the matter is discretionary with the trial court. The Attorney General has filed as amicus curiae in support of the Sullivans' position.

The statute provides as follows:

> "A. A person who sustains injury to his person, business or property by racketeering as defined by § 13-2301, subsection D, paragraph 4 or by a violation of § 13-2312 may file an action in superior court for the recovery of treble damages and the costs of the suit, including reasonable attorney's fees. The state may file an action in behalf of those persons injured or to prevent, restrain, or remedy racketeering as defined by § 13-2301, subsection D, paragraph 4 or a violation of § 13-2312."

The issue presented is apparently one of first impression in this state. Subsection A of the

statute permits a person who is injured by racketeering activity to file a civil action for damages. The word "may" is an auxiliary verb to the verb "file" and serves to permit the private cause of action. The statute does not read "may file an action and may recover treble damages," an inference Metro would have us draw. It clearly indicates that a successful plaintiff is entitled to treble damages, costs of suit and reasonable attorney's fees.

Metro also contends that the language of subsection D, authorizing the trial court to issue any of a number of enumerated orders, renders an award of treble damages discretionary, since one of the enumerated orders is the payment of treble damages to injured persons. The introductory language of subsection D, however, states that the court "may" issue orders because orders that are appropriate in one case may not be appropriate in others. The court is thus granted discretion to

determine which of the listed orders is appropriate in a given case. That language does not affect the requirement that a successful plaintiff be awarded treble damages.

Finally, Metro contends the award of treble damages is discretionary because a similar statute, A.R.S. §23-355, has been held to confer discretion as to the award of treble damages. Abrams v. Horizon Corporation, 137 Ariz. 73, 669 P.2d 51 (1983). That statute permits an employee to recover treble damages from an employer who fails to pay wages due the employee. Contrary to appellees' assertion, however, the statutes are not that similar. A.R.S. §23-355 provides that an employee "may recover" treble damages. Thus, the award is discretionary with the court. There is no such wording in the statute before us.

We hold that the trial court erred in awarding the Sullivans only actual damages. The judgment is modified to include treble damages and is

otherwise affirmed. The appellants will be awarded attorney's fees on appeal as requested upon filing a statement of costs pursuant to Rule 21(c), Rules of Civil Appellate Procedure, 17A A.R.S. (1985 Supp.), and Schweiger v. China Doll Restaurant, Inc. 138 Ariz. 183, 673 P.2d 927 (App. 1983).

/s/
LLOYD FERNANDEZ, Judge

CONCURRING:

/s/
JAMES D. HATHAWAY, Chief Judge

/s/
LAWRENCE HOWARD, Presiding Judge

IN THE SUPERIOR COURT

OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

VIVIAN KRINGLE, CLERK

BY /S/ REC

1984 SEP 14 AM 10: 17

MARK SULLIVAN, an individual; HARRY and HELEN M. SULLIVAN, husband and wife,	)	NO. C-478719
	)	ORDER AND JUDGMENT
Plaintiffs,	)	
v.	)	
METRO PRODUCTIONS, INC., a California corporation; MICHAEL and PATRICIA KATHLEEN MILLER, husband and wife; RALPH and JEAN SMITH, husband and wife; BUSHKIN, KOPELSON, GAIMS, & GAINES, attorneys at law, a California partnership; INVESTORS MANAGEMENT SERVICES, INC., a corporation	)	(Permanently Assigned to Hon. William T. Moroney)

of unknown origin; JAMES and SHIRLYN ALLEN, husband and wife; PRODUCERS' LIAISON CORPORATION, an alleged Delaware corporation; TRAFALGAR ACCEPTANCE CORPORATION, a California corporation; ABC CORPORATIONS I - X; JOHN and JANE DOES I - X; and ENTITIES I - X,

Defendants.

This matter having come before the Court on Plaintiffs' Motion for Partial Summary Judgment with respect to alleged violations of the Arizona Organized Crime and Fraud Act (A.R.S. §13 2301, et seq.) by Defendants Metro Productions, Inc., Producers' Liaison Corporation, Michael and Patricia Kathleen Miller, Ralph and Jean Smith, and James and Shirlyn Allen; and the Court, having

heard both oral and written arguments of the parties and having reviewed the record, and finding that there is no genuine issue as to any material fact; holds that the moving parties are entitled to judgment as a matter of law with respect to Count IV of the Complaint.

The Court being fully advised and after due deliberation, concludes that the Production Service Agreements sold by the Defendants were securities. Those securities were not exempt from registration. The sales of those securities to the Plaintiffs involved the sale of unregistered securities and were in violation of A.R.S. §13-2301(D)(4)(s). The sales of those securities involved unregistered salesmen, which also were in violation of §13-2301(D)(4)(s).

The Court has reviewed the motion of the Defendants Metro Productions, Inc., Smith, Miller, Producers' Liaison Corporation and Trafalgar Acceptance Corporation to reconsider the Court's

order granting partial summary judgment to the Plaintiffs and has previously denied the Motion to Reconsider.

NOW, THEREFORE, IT IS ORDERED, ADJUDDGED AND DECREED;

1. That judgment be entered in favor of Plaintiff Mark Sullivan and against Metro Productions, Inc., Producers' Liaison Corporation, Michael Miller, et ux., Ralph Smith, et ux., and James Allen, et ux., jointly and severally, in the amount of $18,085.00 plus prejudgment interest at the statutory rate of 10% per annum in the amount of $8,346.97 through July 10, 1984, for a total of $26,431.97.

2. That judgment be entered in favor of Plaintiffs Harry and Helen Sullivan and against Metro Productions, Inc., Producers' Liaison Corporation, Michael Miller, et ux., Ralph Smith, et ux., and James Allen, et ux., jointly and severally, in the amount of $30,400.00 plus prejudgment

interest at the statutory rate of 10% per annum in the amount of $14,373.80 through July 10, 1984, for a total of $44,773.80.

3. That the Court declines to award treble damages to the Plaintiffs.

4. That the Plaintiffs be awarded post-judgment interest on said judgment at the statutory rate from the date judgment is entered until the date of payment.

5. That the Plaintiffs recover their costs incurred herein from the named Defendants in the amount of $291.10, plus reasonable attorney's fees as determined by this Court in the amount of $25,000.00.

Jurisdiction is retained by this Court for the purpose of entertaining an application by Plaintiffs to reduce to judgment any mandate of the Arizona Supreme Court which may be issued with respect to Cause No. 17521-SA.

The Court expressly finds in accordance with

Rule 54(b) of the Arizona Rules of Civil Procedure that there is no just reason for delay in the entry of judgment in favor of the Plaintiffs, and it is therefore directed that judgment, as provided herein, shall be entered forthwith.

IT IS FURTHER ORDERED that judgment be entered in favor of the Plaintiffs and against Defendants Metro Productions, Inc. and Trafalgar Acceptance Corporation, dismissing the Defendants' counterclaim with prejudice and ordering that ownership of the three master video tapes, which are the subject matter of this action, revert to Metro Productions, Inc.

IT IS FURTHER ORDERED granting Plaintiffs' Motion to Dismiss Counts I, II, III, V, and VI of the Complaint as to all Defendants.

IT IS FURTHER ORDERED dismissing Count IV of the Plaintiffs' Complaint with respect to Defendants Trafalgar Acceptance Corporation and Bushkin, Kopelson, Gaims & Gaines.

DONE IN OPEN COURT this 13th day of September, 1984.

/s/
THE HONORABLE WILLIAM T. MORONEY
Judge of the Superior Court

SUPERIOR COURT OF ARIZONA

MARICOPA COUNTY

CLERK OF THE COURT

MAIL DISTRIBUTION CENTER

Received DEC 20 1983

Processed DEC 21 1983

22 12-19-83 HON. WILLIAM T. MORONEY I.E.Garcia

Div Date Judge or Commissioner Deputy

No. C-478719

MARK SULLIVAN, et al J. Clayton Berger

vs.

METRO PRODUCTIONS, INC., et al

Stephen E. Richman

Michael J. O'Grady

Daniel P. Jantsch

John Killingsworth

The Plaintiffs have filed a Motion to Correct Minute Entry Nunc Pro Tunc. With the Motion is proposed Findings of Fact. Conclusions of Law and Order as Amended Nunc Pro Tunc. The Defendants have responded in opposition to the Plaintiffs Motion to Correct Minute Entry. The Court has reviewed the file and finds that there are numerous other Motions which have not been resolved. The Court assumes that these matters have not been resolved because, for some reason, duplicate copies of the Motions failed to reach the Court, and the Court has not, until now, become aware that these matters were pending.

In addition to the Plaintiffs Motion to Correct Minute Entry, the Court also has before it the Plaintiffs Motion to Dismiss Counterclaim of Metro Productions, Inc. and Trafalgar Acceptance Corporation, to which no response has been filed; the Plaintiffs Motion to Enter Judgment, and the Plaintiffs Application for Award of Attorneys Fees.

A response has been filed to the Application to Award of Attorneys Fees requesting the Court deny the application and order a hearing to determine whether or not such fees are reasonable.

All Defendants have filed objections to proposed form of Judgment, apparently submitted by the Plaintiffs, containing Rule 54 (b) language and providing for treble damages. Both parties ask for a hearing with respect to whether or not the Court should award treble damages.

The Court has not received a copy of the proposed form of Judgment.

IT IS ORDERED granting the Motion of the Plaintiffs to Correct Minute Entry.

IT IS FURTHER ORDERED Nunc Pro Tunc to November 17, 1983 correcting page two (2), lines three (3) and twelve (12) so that the reference to Count III is Deleted, and a reference to Count IV inserted.

IT IS FURTHER ORDERED Nunc Pro Tunc to

November 17, 1983 that the Minute Order of that date be corrected as follows: On page three (3), line seven (7) the word "over," deleted and the word, "almost," inserted in its place.

IT IS FURTHER ORDERED that the first sentence of that second paragraph on page three (3) is deleted, and the following sentence inserted in place of the deleted sentence: "The Defendant Allen was compensated by the Defendant Metro or Metro's distribution arm, Producers' Liaison Corporation, to solicit investors in Arizona."

IT IS FURTHER ORDERED correcting Paragraph four (4) of page three (3) by deleting in Line one (1) thereof the word, "investment," and substituting the word, "service," therefor.

IT IS FURTHER ORDERED approving Findings of Fact and Conclusions of Law as submitted by the Plaintiff on November 30, 1983.

IT IS FURTHER ORDERED granting Judgment to the Plaintiff on the Counterclaim of Metro

Productions, Inc. and Trafalgar Acceptance Corporation.

The Court assumed, after a review of the Plaintiffs Motion to Enter Judgment, that the Plaintiffs proposed to cause the dismissal of all the other counts except Count IV, the one in which the Court has granted Summary Judgment. Apparently, the proposed form of Judgment submitted by the Plaintiffs did not provide for a resolution of these counts.

IT IS THEREFORE ORDERED sustaining the objections to form of Judgment with reference to a finding by the Court that there is no cause to delay entery of Judgment. Court will not be inclined to enter, pursuant to Rule 54 (b), a partial judgment in this matter.

IT IS FURTHER ORDERED setting for hearing on January 6, 1984, at 9:30 A.M., for a determination of the reasonableness of the Attorney's Fees granted by the Plaintiff and

whether or not an award of treble damages are appropriate. The Court is of the opinion that a resolution of these matters would be premature unless the Plaintiff propose to conclude this litigation entirely. If further litigation is going to be necessary, then the Court will not at this time entertain the Plaintiffs Application for Attorneys Fees, nor will it consider whether treble damages with respect to Count IV would be appropriate.

(oral argument set on January 6, 1984, at 9:30 A.M., as to Objections to Judgment)

SUPERIOR COURT OF ARIZONA

MARICOPA COUNTY

CLERK OF THE COURT

MAIL DISTRIBUTION CENTER

Received NOV 18 1983

Processed NOV 21 1983

22 11-17-83 HON. WILLIAM T. MORONEY I.E.Garcia

Div Date Judge or Commissioner Deputy

No. C-478719

MARK SULLIVAN, an individual and HARRY SULLIVAN, et ux — J. Clayton Berger

vs.

Stephen E. Richman
For: John Killingsworth

METRO PRODUCTIONS, INC., et al — Michael W. O'Grady

Mark W. Romney

Daniel P. Jantsch

The Court has had under advisement the Plaintiffs Motion for Partial Summary Judgment.

The Plaintiffs seek Partial Summary Judgment with respect to Count III which alleges violations of the Arizona Racketeering Act. The thrust of the Plaintiffs argument is that the act defines racketeering as any criminal act punishable by imprisonment for more than one (1) year, involving sale of unregistered securities, and acts involving such securities by unregistered dealers or salesmen. The issues presented to the Court in this Motion is whether or not the sale to the Plaintiffs of single video taped episodes of a proposed television series called the "Sam Diego Show" constitutes a sale of Securities.

IT IS ORDERED granting the Plaintiffs Motion for Partial Summary Judgment as to Count III.

The Court finds the following facts to be undisputed: The Defendant Metro Productions, Inc. produced numerous video taped segments of

various proposed television programs. These segments were intended to be shown on television, generally as programs of one-half hour duration. Metro sold the video tape for each one-half hour show to an investor, who, supposedly, wsa to then find a distributor to market the show. Once the show was marketed, profits would flow to its owner. Because of the nature of the financing through which the programs were sold by Metro to the investors, profits would also flow to Metro, once the show was marketed. The contracts of sale between Metro and the investor are referred to as production service agreements. The Court finds that over one thousand of these production service agreements were sold to investors throughout the United States. These investments were offered without regard to the experience or sophistication of the investors in the television industry. It was not intended or expected by Metro or its salesmen that the typical investor would attempt to market

his tapes himself.

The Defendant Allen was employed by the Defendant Metro's distribution arm, Production Liason Corporation to solicit investors in Arizona. Allen was not registered as a securities salesman.

The investors were tendered an offering brochure a copy of which is attached to the Plaintiffs Motion as Exhibit A.

The Court concludes the following: The production investment agreements were securities. These securities were not exempt from registration. The sale of these securities to the Plaintiffs involved a sale of unregistered securities and is a violation of the Arizona Racketeering Act. The sale of these securities involve unregistered salesmen. This is also a violation of the Arizona Racketecring Act.

(Attorneys notified by telephone on November 18, 1983).

IN THE SUPERIOR COURT

OF

MARICOPA COUNTY,

STATE OF ARIZONA

22	9-2-83	HON. WILLIAM T. MORONEY
Div	Date	Judge or Commissioner

VIVIAN KRINGLE, clerk

Irma E Garcia deputy

C-478719

MARK SULLIVAN — J. Clayton Berger

VS. — Jerry Steele

METRO PRODUCTIONS, INC., et al

Steve Richman

For: John Killingsworth

Michael J. O'Grady

The Court has had under advisement the Motion to Dismiss of the Defendants Metro Productions, Inc., Trafalgar Acceptance Corporation, Producers Liaison Corporation, Ralph and Jane Doe Smith and Michael Miller and Jane Doe Miller.

IT IS ORDERED denying all of these Motions to Dismiss.

(Plaintiff's Motion for Partial Summary Judgment and Motion to Dismiss - set for hearing on October 27, 1983, at 8:00 A.M., in this Div.)

CLERK OF THE COURT
MAIL DISTRIBUTION CENTER
Received SEP 6 1983
Processed SEP 7 1983